No. 12331.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CHARLES I. ROSIN,

Appellant,

vs.

J. P. HART, Trustee in Bankruptcy of the ESTATE OF INTERNATIONAL MINING & MILLING CO., debtor, and SECURITIES AND EXCHANGE COMMISSION,

Appellees.

REPLY BRIEF OF APPELLANT.

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Reply to Appellee's Statement of Issues and Argument.

Pages 6 to 10, Appellee attempts to restate the issues by stating that Appellant has two issues, one of which is (Appellee's Brief, p. 7): That he contends his compensation should be measured by "his effort and diligence" and not by "the benefit to the estate." That is not the issue as Appellant stated it. Points one and two of Appellant's Brief state the issues on this subject: The twist Appellee gives to the issue may facilitate his argument, but is one of his own choosing. It would be foolhardy for Appellant

to claim compensation for "effort and diligence" unless it were coupled with services which were necessary in the preservation of the trustee's estate. When so coupled "effort and diligence" is a material factor.

> *Mortimer v. Pacific States Savings,* 145 P. 2d 733 at 737.

We mention the above because the skill and faithfulness of an attorney are elements to be considered in fixing the fees of an attorney for a receiver.

As pointed out in the opening brief, the Court did not deny compensation because the services were not required or necessary in the preservation of the estate, but erroneously applied the standards of Bankruptcy Act, Section 243, which makes compensation dependent on the "direct benefit to the estate," which language is not used in Section 241 or 258, and which language the Court did use in its findings as the reason for denial of compensation.

The other issue Appellee states is the point as to whether the Court abused its discretion in denying Appellant's claim for compensation. We do not accept Appellee's version of what Appellant's issues are, and prefer to stand on our points as we submit them. They are set out in Appellant's opening brief and there are more than two issues, as stated by Appellee.

POINT I.

Re Appellant's Employment Prior to September 2, 1938.

The gist of Appellee's contention is:

(1) The stipulation for appointment of trustees, and the order appointing them, made no provision for employment of counsel.

(2) The letters between Appellant and Udell do not indicate that Appellant was employed prior to September 2, 1938.

(3) Buxton did not testify regarding any employment prior to September 2, 1938.

(4) Judge Trabucco's letter of May 25, 1938, regarding compensation to Appellant makes no reference to his employment as attorney.

(5) Appellant makes no claim for services prior to the appointment of the trustees.

True, the appointment of trustees stated nothing about appointment of an attorney for them: Such a reference in appointing a trustee is neither customary nor necessary. The Order of Appointment and the Stipulation are in the most brief form, merely stating the duties and functions of the trusteeship (Rosin Appx. pp. 26-31).

With reference to the letters between Appellant and Mr. Udell: The only activity of Mr. Udell in the trusteeship was the management of operation of the mine. Mr. Buxton and Mr. Trask attended to all other business [Buxton testimony, Tr. p. 73, lines 5 to 16; Appellant's testimony, Tr. p. 19, lines 15 to 18]. No appearance in Court was

necessary until the early part of September, 1938, when the Order of Appointment was made [Tr. p. 5, line 22, to p. 6, line 13]. A formal order of appointment for a state receiver is not necessary.

53 Corpus Juris, p. 170.

A receiver may employ counsel without getting authority from the Court.

53 Corpus Juris, p. 377.

A receiver being entitled to the assistance of counsel in proper cases will be allowed reasonable and proper fees in this behalf even where the employment of counsel was not previously authorized by the Court.

There is nothing unusual in an attorney who has been representing a state receiver, requesting the receiver to sign a formal petition for an order for appointment upon the attorney finding it necessary to make a court appearance of record for the receiver. There is nothing unusual or improper in Appellant informing Mr. Udell that the other two trustees had approved of him as their attorney and asking his approval before appearing in Court for them. A reading of the Order allowing appointment of Appellant shows that one of the purposes in having the order of appointment made was the allowance of advancement of costs.

Appellee says Mr. Buxton did not testify regarding the services before September 2, 1938. Mr. Buxton's testimony was relatively brief. He did not testify to all the details testified to by Appellant. When it is remembered

that there were sixteen applicants and the Court allowed only two days for hearing all petitions, Appellant taking more than half of that time on his petition, we do not believe Appellant could be expected to have gone into greater particularity than he did. Mr. Buxton did not testify when Appellant's services commenced. He did testify that Mr. Trask and he, with the help and direction of Appellant, handled all the business affairs. He did not say that such help and direction did not commence until September 2, 1938 [Tr. p. 73, lines 5 to 12].

Finally, Appellant says that Judge Trabucco's letter of May 25, 1938, makes no reference to the compensation of Appellant, referred to in the letter as being for services in the capacity of attorney for trustees, and that Appellant makes no claim for services he may have rendered prior to the trusteeship. Appellant not having been an attorney in the action or before Judge Trabucco before the appointment of the trustees or in any other capacity and making no claim for any other services prior to the trusteeship, the reference by Judge Trabucco in his letter to allowance of fees could not possibly refer to any services excepting in the capacity as attorney for trustees.

POINT II.

Re Compensation for Services Subsequent to September 2, 1938.

On page 13 of Appellee's Brief he states: "The order appointing Appellant as attorney for the State Trustee authorized Appellant to commence certain 'Proceedings intended to be filed by him.'" Appellee must certainly have misread the Order. The text of the quotation given by Appellee does not at all relate to "authorize Appellant to commence 'certain proceedings.'" The quotation is with reference to allowance of "Court costs and other incidental expenses in connection with 'proceedings intended to be filed.'" It is necessary to keep the record straight as a premise for discussion of the facts and issues.

Page 15 of Appellee's Brief states that Appellant exaggerated the extent or importance of his services, claiming credit for results accomplished by others. Particulars as to these claimed exaggerations are the following:

(1) Services with reference to suit filed for accounting against Humphrey (Appellee's Brief, p. 15) and that Appellant's statement in regard thereto is incorrect (Appellee's Brief, p. 16).

(2) Appellant's statement that when petition under Chapter X, was filed, the assets were in excess of $100,000 and liabilities approximately half of that amount (Appellee's Brief, p. 17).

(3) That Appellant erroneously claims that he saved the estate approximately $2,000.00 in settlement of undisputed claims (Appellee's Brief, p. 18).

(4) That his appearance in San Francisco on the trial of the Reimer and Edwards claims is not a subject for compensation (Appellee's Brief, p. 19).

(5) That his services in answering the Gustaveson suit are not a subject for compensation (Appellee's Brief, p. 20).

(6) That Appellant attempted to mislead the Court with reference to his services on Humphrey motion to discharge the trustees (Appellee's Brief, p. 21).

(7) That Appellant was a mere volunteer in opposing motion of Ilseng to dismiss action No. 1646 (Appellee's Brief, p. 21).

(8) Vague reference to appearances in Court proceedings and no reasons given for the giving of office time to the business of the trusteeship.

Greater particularity of these inaccuracies as stated by Appellee are as follows:

On page 16 of Appellee's Brief in discussing the accounting suit against Humphrey, reciting facts testified to by Appellant, the paragraph commences with the statement that Appellant's contention that the stockholders' suit was later prepared on data compiled by Appellant and that the attorneys in Chapter X proceedings, for which compensation was allowed, had the benefit of Appellant's preparation, is an incorrect statement. However, in Note 13, on page 17 of the brief, Appellee cites the evidence proving this very contention of Appellant. Appellee concludes in said Note 13 with the statement that the data prepared by Appellant for this suit was not produced in evidence. Neither the Court nor other counsel at the hearing asked for such data from Appellant or similar data from the attorneys who were allowed compensation

in a hearing covering any of the other petitions, consuming a total of two days, of which time Appellant used more than half of the total time, the argument that Appellant did not go more fully into detail does not carry conviction.

Apparently the Court did not feel that the other fifteen petitioners heard in approximately one day, were required to testify in such extensive detail regarding their services, which it is complained Appellant failed to do. The preparation of the suit by Appellant and filing thereof against Humphrey was upon Order of the Court, later rescinded to save further expense. For services rendered on this action until revocation of Order by the Court, Appellant is entitled to compensation, though upon such revocation Appellant undertook to proceed with the action on agreement for compensation depending on recovery, which through no fault of Appellant, the Trustees ordered discontinuance of. We fail to find from Appellee's statements and arguments in what particular Appellant has incorrectly stated the facts.

Appellee's Brief, page 17, states that the matters recited by Appellant are incorrect with reference to the successful administration by the State Trustees. The statement in Appellant's Brief of current assets and liabilities at the time of filing under Chapter X are taken directly from the Statement of Account in the petitions filed by Humphrey for reorganization, who certainly cannot be accused of attempting to show the State Trustees in a favorable light. Appellee further states that the petition for Chapter X proceedings alleges that the debtor is unable to meet its debts as they mature. Neither the State Trustees nor Appellant can accept responsibility for such unsupported statement by Mr. Humphrey in his petition. It has no foundation in truth or fact. Not only

had the Trustees taken care of all current accounts, but had reduced the liabilities which were outstanding when they went into office. The falsity of Humphrey's petition for reorganization is apparent on its face.

From the proceedings that had taken place before the filing thereof it is apparent that Humphrey was only interested in ousting the trustees and obtaining control of the coffers of the company himself, and falsely averred in the petitions to support his request that he have control of the affairs of the corporations; that his board of directors were then in charge and control, when the fact was that the trustees acting under the State Court had been in control for more than a year. In his petition he failed to inform the Court that such trustees were then in active charge. The threat of attachments referred to in the petition are levys Humphrey himself attempted to make by attempting to buy up an existing judgment, in which he was frustrated by Appellant [Tr. p. 25]. The integrity of Humphrey's petition as authority for Appellee's statement lacks persuasion, for the threatened attachments were those on claims he was attempting to purchase so that he could use them to embarrass the Corporations. In disputing the efficacy of the services of the Trustees and Appellant as their counsel, Appellee asserts that $203,000.00 in claims were filed in Chapter X proceedings. He fails to state that these were not primarily claims or accounts incurred by the Trustees, but mostly disputed claims, including those without any merit which originated prior to the trusteeship, including a number which had not theretofore been made in the State Court, and claims for attorney fees for services in the State Court proceedings, which it is unlikely would have had much favorable consideration in that Court. Appellant seems to take much satisfaction in the fact that these

claims, for the most part, disputed, rejected, and often without any merit, were reduced from $203,000 to $113,-000. This at an expense of $145,000 allowed before the hearing for final allowances and $33,000 allowed at that time, a total of $178,000 (Appellee's Brief, p. 27) is not very impressive.

In Appellee disputing Appellant, he states: "The facts are to the contrary" in commenting on Appellant's statement of the successful operation by the State Trustees. We fail to find substance to the charge by Appellee unless the basis of his premise is the obvious false petition for reorganization filed by Humphrey.

Appellee further accuses Appellant of misstating the facts relative to the settlement of undisputed claims at a saving of approximately $2,000. In doing so he disregards much of the evidence in this particular. Appellant at no time stated that this settlement was accomplished without the aid of others. On page 17, Rosin Appendix, Appellant states that he appeared in Superior Court at Mariposa for the Court to sign the approval of the compromise. In this apparently he is in error. Mr. Ilseng testified that he brought the Order, which Appellant had prepared, up to Judge Trabucco. Mr. Ilseng is correct. After a lapse of ten years some incidents of not too great significance lose their vividness. Appellant appeared before the Court frequently, and if Appellant stated in error that he personally presented the Order, it was not intentional. It is true that Appellant gave the Order to Mr. Ilseng to hand to Judge Trabucco. However, in his testimony Appellant stated that he prepared the affidavit and Order, and gave same to Mr. Ilseng to take to Mariposa. Aside from that, we do not find the claimed incorrectness in Appellant's statements. A reading of Appellant's petition (Rosin Appx. 16) specifically recites that his services

were "with the assistance of the Trustees" and "In collaboration with the Trustees." Also, Transcript, page 22, line 7, to page 26, line 26, Appellant states specifically what he did and of the time spent with the Trustees on the matter. Also, Mr. Ilseng testified (see Appx. p. 4) that Appellant, Mr. Buxton and he drove up to La Jolla, where Mr. Trask lived, and spent the day there; that Appellant phoned attorneys in San Francisco regarding accounts, and going over undisputed claims in the amount of approximately $27,000, which it was advisable to pay and obtain discounts wherever possible. Appellee states (Brief, p. 19, Note 14) that Appellant claims credit for settling Atlas Powder Co. claim, and that the extent of the services are not ascertainable. Transcript, page 22, line 22, to page 23, states what Appellant did.

Appellant had been negotiating with attorneys Busch & Simpson of San Francisco, representing Atlas Powder Co., in a judgment which, with interest, amounted to about $1750.00 and which Humphrey was attempting to buy so he could use it for levy against the corporations [Tr. p. 23], which was settled for $1,000. That Appellant and the Trustees discussed a number of other claims which it was determined not to pay. That prior to the meeting in La Jolla, the said claims to be paid were discussed on many occasions with the Trustees.

Appellee's Brief, page 19, regarding trip from Los Angeles to San Francisco to oppose Reimer and Edwards action, Appellee brushes the matter off very lightly. On Transcript page 34, line 24, to page 37, line 6, Appellant testified about learning of the actions, that as a result of the information he had, he believed that the claims were not meritorious and that the actions were collusive with Humphrey. That he went to San Francisco, took

Ilseng along as a witness and appeared in Court, and that after examination of witnesses by Appellant, the parties compromised the action. Going to San Francisco, appearing in Court, and return to Los Angeles took several days. Appellant would have been derelict in his duty had he failed to take steps in an effort to prevent these collusive proceedings. Appellee says that in Chapter X proceedings, one of these claims was allowed and one compromised. Appellant does not know to what extent these claims were opposed, nor was he called upon for information available. The responsibility for the later allowance and compromise of these claims is not that of Appellant. The Appellant was not requested to appear as a witness in Chapter X proceedings on these claims, though he offered the Trustee's counsel to go to Carson City as a witness [Tr. p. 37].

Appellee's Brief p. 20—Re Gustaveson Suit.

Appellee states Appellant procured no Court authorization to defend the action. None was required. The suit was to quiet title against the corporation of which the Trustees were in charge. The directors of the corporation were not functioning; the Trustees were responsible to defend the lease, the principal asset of the corporation. Further objection by Appellee is that the Order appointing trustees provides that no new litigation shall be commenced without Order of the Court. Defense of an action commenced by a third party to quiet title to the corporation property is not "commencing a new action." Preparation of the defense upon advice of trustees Buxton and Trask was prior to confinement by Appellant as a result of an automobile accident on the way back from a hearing in Mariposa. The month following, March, the

answer was prepared and sent to Mariposa for filing. Mr. Trask had in the meantime been intimidated by Mr. Humphrey to resign as trustee, and to Appellant's knowledge, he had not been replaced. Trustee Udell did not take part in the business affairs of the corporation. Appellant was carrying out orders he had received from Trask and Buxton to file the answer [Tr. p. 15, line 22, to p. 19, line 26]. It is an unusual criticism that a trustees' counsel was too mindful in protecting the interest of the estate he represents. We must presume from Appellee's argument that his recommendation would have been to take the risk of having a default entered. Appellee concludes with the assertion that Appellant was not responsible for the dismissal of the action. Appellant has no information regarding the cause of dismissal and never suggested that he had, though Appellee without any grounds therefore states that Appellant "seemingly suggests" that he was responsible for the dismissal.

Appellee's Brief p. 21—Re Opposition of Motion to Dismiss Trustees.

It gives Appellants as counsel appearing in *propria personam* little satisfaction to engage with opposing counsel in attack and counter-attack on the genuineness of statements made in a brief. He is aware too that the Court does not look with favor on such conduct. However, to fail to call the Court's attention to inaccuracies in reference to the record may imply assent. In relation to Appellant's reference to his services on the Motion to Dismiss Trustees, insinuation is made that Appellant attempted to mislead the Court with these words (Appellee's Brief p. 21) "He omitted to disclose, as he later testified on cross-examination, that two other attorneys represent-

ing various parties in No. 1646 vigorously opposed the Humphrey motions." Such insinuations are not in good grace, particularly when not well founded. To support the insinuation of Appellant attempting to mislead the Court, Appellant cites Transcript pages 32-34 and S. E. C. Appx. 4. These citations do not bear out his assertions. There is no evidence that *two* other attorneys *vigorously* opposed the motion. The evidence is that Mr. Kempley didn't feel the appointment should be vacated and that he appeared; also that Mr. Hubbard, who represented Humphrey who made the motion, and with whom he had temporarily fallen out, was also present. There is no evidence that he opposed it *vigorously* or otherwise. If he did not represent Humphrey, the maker of the motion, at that time, he represented no one. Also cited from Sec. Appx. 4 is Mr. Kempley's record of time. Of course, Appellant does not feel responsible for the record of his time as submitted on his petition for fees, any more than he could be asked to be held responsible for Appellant's petition, though it is not disputed that he was present in Court. The trusteeship being attacked was that of Appellant's clients and the responsibility of defending the motion was his.

Appellee proceeds (Brief p. 21) to state that Appellant admitted he did not participate in the proceeding on the Petition for Writ of Prohibition in the Supreme Court, making it appear that Appellant claimed participation in that proceeding. The petition was *ex parte* by Humphrey and without notice or necessity of other parties appearing. The petition was denied. All that Appellant stated [Tr. p. 32] was that after denial of the motion in Mariposa, Humphrey requested a writ in the Supreme Court and upon denial, the proceeding under Chapter X was filed.

Further attack as made on the petition for allowance on appearance before the Superior Court at Mariposa, on motion to dismiss action No. 1646, the action under which the Trustees were appointed. Appellant was no volunteer. The motion was in the Court to which the Trustees were responsible and whom he was counsel for. No advice was given Appellant that the Chapter X trustee would defend the motion or that he had been served with it. True, the trial court found as a result of the services of Braucht the action *was not* dismissed. However, the unrefuted testimony of Appellant is that at the hearing he was not aware of any Mr. Braucht being present [Tr. p. 38].

Objection is further made (Appellee's Brief p. 23) to allowance of compensation for office and out of court services. There is no purpose in repeating the undisputed evidence thereof given by Appellant and Trustee Buxton. However, the record shows [Rosin App. pp. 45 and 46] that Mr. Thatcher had been allowed $4,250 for services from August 29, 1939 to October 17, 1940, during which period associate counsel for trustee Bartlett, was allowed $750, and co-counsel James T. Boyd $1100.00, making a total allowance of $6,100 for trustee's counsel for approximately one year, during which time there was no litigation, and where substantially all the stenographic work was done through the trustee's office [Findings XII to XVI—Rosin App. pp. 45 and 46]. It may also be observed that the said counsel who were allowed these fees had let more than a year elapse without undertaking the litigation which has sporadically thereafter been undertaken from time to time, dragging the proceedings out for a ten-year period.

Except for the claimed "inaccuracies" of Appellant, which are unfounded, the services claimed to have been rendered by Appellant are not denied. Nor can they be.

As argument why the amount prayed for by Appellant is excessive, Appellee points to the fact that the Trustees during the period of the trusteeship received but $5800, which we presume is intended as a reason why Appellant should not be allowed an amount in excess thereof. Though there may be some relationship in fees between a trustee and his attorney, the test is the comparative value of the services rendered as is noted in 53 Corpus Juris 380 (Note 58a). A fee allowed for legal work is gross rather than net and is fixed with some regard for the amount of clerical work done by or for counsel. *Conover v. West Jersey Mrt.,* 96 N. J. Eq. 441, 126 Atl. 855—Where counsel did more work than receiver his compensation may exceed that of the Receiver (citation from same case).

In this matter the time and effort devoted by appellant far exceeds that of all the trustees. Buxton and Trask conferred from time to time regarding the business affairs. Udell kept informed on and directed mining operations. To all the trustees, they were extra-professional duties; to appellant it was a professional duty, rendering service in the course of his employment, maintaining an office and carrying out the instructions of the trustees [Rosin App. p. 18]. As cited in the opening brief (*Vedeer v. Public Service*) the Court in that instance allowed $6,000 to the receiver and $22,500 to his attorney. Appellee also cites authority to the effect that in a certain instance the Court reduced on appeal the allowance made by the trial court. There is no question but what the Appellate Court may do so. It may also increase the allowance as made. (*In re New York Investors* (79 F. 2d 182).)

POINT III.

Regarding Compensation Covering Period Under Chapter X Proceedings.

Appellee's brief under point 3, pages 23 and 24, states that the only services for which Appellant claims compensation are—appearing in opposition to Chapter X proceedings, and in connection with filing reports of State Trustees, making appellant's connection therewith appear rather trivial. Answer to petition was filed in both actions. More than mere appearance in Court is necessary on matters of such import. Preparation of pleadings of this nature require time and care [Tr. p. 51]. Preparation for an appearance of this nature is a matter of days. The other services Appellee refers to is in connection with filing a report. This is referred in Rosin Appendix pages 19-20. Appellee states that as Chapter X trustee's auditors had prepared an accounting in Chapter X proceedings, the Final Account of State Trustee was unnecessary. In this we cannot agree with Appellee. The State Trustees were entitled to file their final accounting and obtain a discharge. The Court denied them this right, the Trustees in good faith should render their account to the Court, independent of auditors acting on behalf of a superseded proceeding.

Appellee has no doubt inadvertently overlooked [Rosin App. p. 20; Tr. p. 51] the appearance in Court (500 miles from his office in Los Angeles) to resist motion to remove Appellant as attorney for State Trustees, and that in 1940 he appeared with reference to a proceeding in connection with the account of Humphrey involving his operations during the period when he controlled the funds of the corporations [Rosin App. p. 20].

The findings here specifically are to the effect that the Appellant did not represent the trustees. In view of the law, and the evidence as pointed out in the opening brief and also in this brief, such a finding is directly contrary to the evidence. The motion of Mr. Thatcher made the early part of the Chapter X proceedings, for removal of Appellant as attorney of record, was not granted, and Appellant appeared before the Court on a number of occasions thereafter, and Mr. Udell and Mr. Buxton were both in Court when Appellant appeared therein, and no contention made by either of them or the Court that Appellant was not properly in Court. The evidence is neither disputed nor discredited. The finding is a complete negation thereof.

POINT IV.

The Findings Are Not Supported by the Evidence.

Appellant will not burden this Court by repetition of his argument in the opening brief, only to reply briefly to Appellee's Point IV. Appellee uses the terms "enormous claim," "exaggerated claim." We will not engage in a discussion of adjectives. No evidence has been presented refuting Appellant's proof; in view of this evidence, we submit the claim is reasonable, in view of allowances made to others in this proceeding, on the basis of services performed, it is exceptionally modest.

Appellee bases comparative value of services on the time the proceedings were pending. By reason of the years elapsing between lethargies in the Chapter X proceeding as apparent from the record, for spreading it out to ten years, Appellees justify the allowance of fees there compared to no allowance to Appellant. The argument that $200,000 claims (mostly disputed, and not incurred by State Trustees) were settled for $113,000 is answered under Point II.

POINT V.

The Discretion of a Trial Court in Awarding Attorney Fees Is Subject to More Extensive Review When the Services Were Not Performed Before the Judge Making the Award and the Appellate Court Is in as Favorable Position to Determine the Extent of the Services as the Trial Court.

Appellee cites authority to the effect that ordinarily an Appellate Court will not disturb the reasonable use of discretion by the trial court. That is true where men could reasonably differ in opinion. Here the order when compared to similar services and awards made thereon to other attorneys in the proceeding is entirely out of proportion, and the Appellant has at no time previously appeared before the trial judge in behalf of the trustees and the trial judge has no personal knowledge of the services rendered. The Appellate Court is in as good position as the Trial Court to determine what a reasonable fee should be.

Mortimer v. Pacific States, 145 P. 2d 733 at 737.

However it is held that the matter is discretionary only in the sense that there are no fixed rules for determining the proper amount and not in the sense that the Court is at liberty to award more than fair and reasonable compensation (53 C. J. 378), nor less than such compensation for the same reason—(continuing at p. 739). The rule heretofore adverted to that fixing the compensation of receivers and their counsel is ordinarily for the Trial Court and will not be interfered with on appeal unless there is an abuse of discretion is based upon the consideration that usually the Court has better means of knowing what compensation is just and reasonable than the Appellate Court. But this consideration is of no force in this

case because Appellant's testimony which is not contradicted in any respect has presented such a clear picture of all that transpired in the lower Court concerning which he rendered service during his employment that we are able to judge the matter as well as the Trial Court. * * * For the foregoing reasons we see no useful purpose to be accomplished in sending the case back for a new trial for the purpose of an additional allowance for the year 1941. We are able to fix additional compensation for the year 1941.

POINT VI.

Appellee Has Failed to Controvert the Issues Raised by Appellant.

Appellee has devoted substantially all of his brief in quibbling over whether Appellant exaggerated the value of his services, but he has failed to answer the pertinent issues raised by Appellant in his opening brief, such as—

(1) That contrary to the finding of the Court, the services rendered by Appellant were of substantial and demonstrable benefit.

(2) That contrary to the finding of the Court, Appellant has rendered services of substantial and demonstrable benefit in Court proceedings after October 3, 1938, in addition to office and routine services, until the filing of Chapter X proceedings, the following include:

Defending motion to discharge trustees — March, 1939 [Rosin App., p. 11].

Defending motion to vacate appointment of trustees —June, 1939 [Tr. pp. 27 and 28]. This is not the same motion as shown on Mr. Kempley's record of time [Sec. App., p. 4].

Appearance in Superior Court, San Francisco, in opposition to Reimer and Edwards claims—June, 1939 [Tr. pp. 34 to 37].

Preparation on, and appearance on Order to Show Cause against Humphrey, who was negotiating with creditors to buy their claims so that he might use same to levy against the corporations, and who was collusively having process served on his *de facto* officers without notifying the trustees—May and June, 1939 [Tr. pp. 13 and 14].

Preparation of Answer to Gustaveson suit—January to March, 1939 [Tr. pp. 15 to 18].

Defending Motion to dismiss action under which Trustees were acting (#1646)—June, 1947 [Tr. p. 37].

Settlement of Undisputed Claims after conference at La Jolla with trustees at a saving of approximately $2,000.00—December, 1938 [Tr. pp. 24 to 26].

As will be noted, services on these matters were all after October 3, 1938, the last date the Court found any services of benefit to the estate, were rendered.

(3) Appellee has failed to show that services rendered by Appellant were not necessary in the conduct of the receivership. In Findings XXII to XXV, inclusive, the Court, in limiting the period of time services were rendered confines it to September 2 to October 3, 1938, and to one proceeding, to-wit: the Order to Show Cause Against Humphrey. However, even during this period of time —one month—the record is clear that Appellant worked

Saturday and Sunday with the bookkeeper at the mine in preparing a current account of the Trustees and that the same was filed and approved [Tr. p. 51]. This apparently is one of the services which the Court found of no benefit to the estate.

(4) Appellee has failed to show that the Court was not in error in using the language of Section 243 of the Bankruptcy Act as a basis for disallowing compensation, or that Section 258 is not the proper section applicable to Appellant's petition, or that necessity of the services is not the proper guide in case of attorney for a receiver, rather than the "demonstrable benefit."

(5) Appellee has failed to reply to the issue that the Court, in denying compensation to Appellant has not used the same standard for allowances as applied to other petitioners in the particulars as pointed out in the opening brief.

(6) That Appellee has failed to show that the Findings in the particulars set out in Appellant's opening brief are not contrary to the evidence, an evasion of finding on the issues, speculative in their meaning, and not findings at all, and that a reading of them indicates an effort to avoid finding on undisputed facts favorable to Appellant.

(7) The point that the Court erred in finding that Appellant was not the attorney for the trustees during the Chapter X proceedings when the Appellant appeared before the Court on numerous occasions, has not been met by Appellees. Quibbling by Appellee as to which trustee signed the petition and other such devious arguments, do not answer the fact that the Court did not grant Mr. Thatcher's motion to remove Appellant as such counsel and that the Court thereafter, as well as before, entertained Appellant as trustees' attorney, and that not only

Trustee Buxton, but Trustee Udell was present in Court when Appellant took part in proceedings as attorney for the State Trustees, as pointed out in the opening brief.

Conclusion.

Appellant has refrained from reiterating or repeating matters and issues presented in the opening brief, except to call attention to the fact that Appellee has failed to meet them. Notwithstanding the strenuous opposition of Appellee, to the extent of making unfounded attacks on Appellant's recitals in his brief and making unwarranted conclusions from the evidence, he has not overcome the points raised. None of Appellant's evidence has been controverted. The sole argument is that he overrates its value in terms of compensation. A reference to the petition (stipulated to, to have the effect of evidence) and the transcript of testimony supporting it, speaks for itself.

It is difficult to justify an interim allowance of $500.00 to Appellant as sufficient compensation, in comparison to fees of more than $6,000.00 to trustees attorneys in this matter covering a period of approximately a year, referred to in this brief, during which period of time no court proceedings were prosecuted or defended, and where the attorneys were under no secretarial expense; or in comparison to allowanc of $4,000 as fees for the handling of one creditor's claim which was finally compromised (allowance to Griswold and Vargas), or the duplication of allowances to various counsel in substantial sums, for which services trustee's counsel was also compensated (see Findings on Kempley's petition, and Boyd's petition); or allowance to trustee's attorney Boyd, who served from 1940 [Finding LXXVII] to 1946 [Finding LXXX] in the sum of $24,375.00. This allowance, notwithstanding

that other counsel were also allowed compensation for services enumerated in Findings on Boyd, and that the Court in its Findings [Finding LXXXIV to LXXXVII] criticized counsel for making no effort for a period of five years to review an Order of the Referee on the Ilseng claim, and who failed to bring to the attention of the Court facts he had learned of, bearing adversely on the merits of the claim [Finding LXXXIV], and who took no opposition to the claim, although its validity was in litigation and matters bearing on its validity was brought to the attention of counsel [Finding LXXXV]. No doubt, compensation would have been allowed substantially above $24,375.00 if said counsel had given proper attention to his duties.

Nor does Appellee comment on the comparison of the Order of Disallowance to Appellant and the allowance on a claim of Hubbard and Hogan, Humphrey's attorneys, in a sum in excess of $15,000.00, for appearances in the Mariposa Superior Court where they did not represent an arm of the Court and where they not only brought no "substantial or demonstrable benefit" but in collaboration with Humphrey, did all in their power to jeopardize the interests of the corporations.

It is unnecessary to make further comparisons on the standard used by the Court in the treatment of Appellant's petitions and that of other counsel. The Record speaks for itself. A year of Appellant's time and office facilities, to the extent of being required to use the services of another attorney to relieve him of other duties, has been devoted to the trusteeship, and a sum not even sufficient to compensate for secretarial services ($500.00) is found to be adequate compensation. If that be a fair, just or unbiased consideration of Appellant's petition, par-

ticularly when considered with the orders made to other counsel, then Appellant must admit his loss of all sense of proportion.

Appellant respectfully submits that the order made be set aside and that this Court make a new order based on a fair and reasonable evaluation of his services rendered, as shown by the evidence, which Appellant believes to be in the amount prayed for. This being a matter where the services rendered were not before the Judge, whose order is here for review, this Court is as well informed as the Court below of the nature of such services. A referral back to the Trial Court would serve no effective purpose in this instance.

Respectfully submitted,

CHAS. I. ROSIN,

Appellant in Propria Personam.